APPEAL NO. 161491
FILED SEPTEMBER 23, 2016

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on February 2, 2016, with the record closing on June 14, 2016, in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by determining that: (1) the (date of injury), compensable injury does not extend to cervical radiculopathy, C5-6 nerve irritation, C6-7 nerve irritation, brachial neuritis/radiculitis, lumbar spine disc pathology, sacrum, thoracic spine, right shoulder, post-traumatic stress disorder (PTSD), depression, anxiety, short-term memory loss, amnesia, vision problems, tinnitus, chronic pain syndrome, cervicalgia, cervical discogenic pain syndrome, and traumatic brain injury; (2) the respondent/cross-appellant (claimant) reached maximum medical improvement (MMI) on the statutory date of September 5, 2014; (3) the claimant's impairment rating (IR) is 33%; and (4) the first certification of MMI and IR assigned by (Dr. S) on October 31, 2014, did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12).

The appellant/cross-respondent (carrier) appealed the hearing officer's MMI and IR determinations, contending that those determinations are against the great weight and preponderance of the evidence. The claimant responded, urging affirmance of the hearing officer's MMI and IR determinations. The claimant cross-appealed the hearing officer's extent of injury and finality determinations, contending that those determinations are against the great weight and preponderance of the evidence. The claimant also contended that the correct IR is 51% as certified by Dr. S, the designated doctor. The carrier responded, urging affirmance of those determinations.

DECISION

Affirmed in part, reformed in part, reversed and rendered in part, and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on (date of injury), at least in the form of a right rib fracture, superior orbital laceration, cervical sprain/strain, concussion, and cervicalgia. We note that the hearing officer determined the compensable injury does not extend to cervicalgia despite the parties' stipulation to the contrary, which is addressed below. The parties also stipulated that the compensable injury does not extend to C5-6 nerve irritation, C6-7 nerve irritation, brachial neuritis/radiculitis, lumbar spine disc pathology, sacrum, thoracic spine, and

right shoulder. The claimant testified that he does not recall the details of the accident. The record indicates that the claimant and several other coworkers were holding a tree branch down with a rope, and that when the claimant's coworkers released the rope the claimant did not and was catapulted approximately 60 feet into a metal propane tank. The record also indicates that the claimant lost consciousness and was airlifted to the hospital.

FINALITY

Section 408.123(e) provides that except as otherwise provided by Section 408.123, an employee's first valid certification of MMI and first valid assignment of an IR is final if the certification or assignment is not disputed before the 91st day after the date written notification of the certification or assignment is provided to the employee and the carrier by verifiable means. Rule 130.12(b) provides, in part, that the first MMI/IR certification must be disputed within 90 days of delivery of written notice through verifiable means; that the notice must contain a copy of a valid Report of Medical Evaluation (DWC-69), as described in Rule 130.12(c); and that the 90-day period begins on the day after the written notice is delivered to the party wishing to dispute a certification of MMI or an IR assignment, or both.

Section 408.123 provides in part:

> (f) An employee's first certification of [MMI] or assignment of an [IR] may be disputed after the period described by Subsection (e) if:
>
> (1) compelling medical evidence exists of:
>
> (A) a significant error by the certifying doctor in applying the appropriate American Medical Association guidelines or in calculating the [IR];
>
> (B) a clearly mistaken diagnosis or a previously undiagnosed medical condition; or
>
> (C) improper or inadequate treatment of the injury before the date of the certification or assignment that would render the certification or assignment invalid.

The hearing officer found that Dr. S's September 5, 2014, date of MMI and 51% IR was a valid rating. This finding is supported by sufficient evidence and is affirmed. *See* Appeals Panel Decision (APD) 100636-s, decided July 16, 2010.

The hearing officer also found that Dr. S's September 5, 2014, date of MMI and 51% IR was not provided to the carrier by verifiable means. The hearing officer noted in

the Discussion that a Notification of [MMI]/First Impairment Income Benefit Payment (PLN-3) dated November 14, 2014, from the carrier to the claimant acknowledged receipt of Dr. S's October 31, 2014, MMI/IR certification that the claimant had reached MMI on September 5, 2014. The hearing officer further noted that although the PLN-3 addressed the number of weeks the claimant was to receive impairment income benefits (IIBs) (153 weeks), the PLN-3 did not address or acknowledge the IR itself. The hearing officer then stated that had the PLN-3 acknowledged the IR "this would have been [the] [c]arrier's acknowledgement of receipt of the MMI and IR and thus began the initial timeframe for the 90 days to dispute the MMI and IR." The hearing officer stated that because the carrier "only acknowledged the date of MMI, the hearing officer cannot find unequivocally that [the] [c]arrier was in receipt" of Dr. S's MMI/IR certification, and therefore it did not become final.

In APD 080301-s, decided April 16, 2008, the hearing officer believed that the carrier had the first valid MMI/IR certification by the date of its PLN-3. The carrier's PLN-3 referenced the first valid MMI/IR certification and stated that a copy of that certification was attached. The Appeals Panel held that a carrier's reference to the first MMI/IR certification in a PLN-3 and its sending a copy of the MMI/IR certification to the Texas Department of Insurance, Division of Workers' Compensation (Division) established acknowledged receipt of the first MMI/IR certification.

In the case on appeal the hearing officer clearly believed that the carrier received Dr. S's MMI/IR certification certifying that the claimant reached MMI on September 5, 2014. However, the hearing officer found that because the PLN-3 did not contain the IR, even though it acknowledged the number of weeks the claimant would receive IIBs which is based on the IR, the carrier's PLN-3 did not constitute the carrier's acknowledgement of receipt of Dr. S's MMI/IR certification. Although the carrier's PLN-3 does not list the IR number itself, it does state that based on Dr. S's certification the claimant would receive 153 weeks of IIBs, which is the correct number of weeks of IIBs based on a 51% IR. The PLN-3 also states that a copy of Dr. S's DWC-69 was included with the PLN-3. The hearing officer's finding that Dr. S's September 5, 2014, date of MMI and 51% IR was not provided to the carrier by verifiable means is so against the great weight and preponderance of the evidence as to be manifestly unjust. Accordingly, we reverse the hearing officer's finding that Dr. S's September 5, 2014, date of MMI and 51% assigned IR was not provided to the carrier by verifiable means, and we render a new determination that Dr. S's October 31, 2014, MMI/IR certification was provided to the carrier by verifiable means, based on the carrier's acknowledged receipt on November 14, 2014.

The 90th day after November 14, 2014, is Thursday, February 12, 2015. Rule 130.12(b)(1) provides that to dispute a first certification of MMI or assigned IR, the

disputing party may either request a Benefit Review Conference (BRC) under Rule 141.1 or request the appointment of a designated doctor, if one has not been appointed. Dr. S, the designated doctor, issued the first MMI/IR certification on October 31, 2014. The only avenue by which the carrier could dispute Dr. S's MMI/IR certification was by requesting a BRC no later than February 12, 2015. The record contains no evidence as to the date the carrier filed a Request for [BRC] (DWC-45). Without knowing the date the carrier disputed Dr. S's October 31, 2014, MMI/IR certification, a determination whether or not the carrier timely disputed that certification cannot be made. Accordingly, we reverse the hearing officer's determination that the first certification of MMI and IR assigned by Dr. S on October 31, 2014, did not become final under Section 408.123 and Rule 130.12, and remand this case to the hearing officer on this issue to make a finding of fact as to the date the carrier filed its DWC-45 disputing Dr. S's October 31, 2014, MMI/IR certification. On remand the hearing officer shall take official notice of the Division records regarding the date the carrier filed with the Division its DWC-45 disputing Dr. S's October 31, 2014, MMI/IR certification.

We note the carrier argued at the CCH that two of the exceptions to finality contained in Section 408.123(f)(1) applied in this case, specifically Section 408.123(f)(1)(A) and (B). However, the hearing officer made no findings of fact, conclusions of law, or a determination regarding any exceptions to finality. If the hearing officer determines that the carrier did not timely file a DWC-45 disputing Dr. S's October 31, 2014, MMI/IR certification, the hearing officer is to make findings of fact, conclusions of law, and a determination regarding the exceptions to finality argued by the carrier.

MMI/IR

Because we have reversed the hearing officer's determination that the first certification of MMI and IR assigned by Dr. S on October 31, 2014, did not become final under Section 408.123 and Rule 130.12 and have remanded that issue to the hearing officer, we reverse the hearing officer's determinations that the claimant reached MMI on September 5, 2014, with a 33% IR, and we remand the issues of MMI and IR to the hearing officer.

STATUTORY MMI DATE

The parties did not agree as to the date of statutory MMI in this case. The carrier argued that the MMI date of September 5, 2014, is after the statutory MMI date. The evidence established that the claimant did not immediately return to work after his injury but he did in fact return to work on a light-duty basis at some point for a period of time. However, the evidence did not establish on what date the claimant returned to work, for how long the claimant returned to work, the hours the claimant worked, the pay the

claimant received, or any other relevant facts. *See* Section 408.082(b). Section 401.011(30)(B) defines statutory MMI as "the expiration of 104 weeks from the date on which income benefits begin to accrue." Because the evidence did not establish the dates of disability, the date of statutory MMI cannot be determined. If it is determined that Dr. S's October 31, 2014, MMI/IR certification became final, the date of statutory MMI has no bearing. *See* APD 100636-s, *supra*. However, if it is determined that Dr. S's October 31, 2014, MMI/IR certification did not become final, the hearing officer is to make findings of fact regarding the date of statutory MMI.

EXTENT OF INJURY

That portion of the hearing officer's determination that the (date of injury), compensable injury does not extend to C5-6 nerve irritation, C6-7 nerve irritation, brachial neuritis/radiculitis, lumbar spine disc pathology, sacrum, thoracic spine, right shoulder, PTSD, depression, anxiety, short-term memory loss, amnesia, chronic pain syndrome, cervical radiculopathy, cervical discogenic pain syndrome, vision problems, tinnitus, and traumatic brain injury is supported by sufficient evidence and is affirmed.

The parties stipulated at the CCH that the compensable injury was at least in the form of a right rib fracture, superior orbital laceration, cervical sprain/strain, concussion, and cervicalgia. However, Finding of Fact No. 1.D. omits the condition of cervicalgia from the parties' stipulation. We reform Finding of Fact No. 1.D. to include the condition of cervicalgia to reflect the correct stipulation made by the parties at the CCH.

The hearing officer determined that the (date of injury), compensable injury does not extend to cervicalgia. However, the parties stipulated at the CCH that the compensable injury does extend to that condition. Accordingly, we reverse that portion of the hearing officer's determination that the (date of injury), compensable injury does not extend to cervicalgia, and we render a new decision that the (date of injury), compensable injury does extend to cervicalgia.

SUMMARY

We reverse the hearing officer's finding that Dr. S's September 5, 2014, date of MMI and 51% assigned IR was not provided to the carrier by verifiable means, and we render a new determination that Dr. S's October 31, 2014, MMI/IR certification was provided to the carrier by verifiable means, based on the carrier's acknowledged receipt on November 14, 2014.

We reverse the hearing officer's determination that the first certification of MMI and IR assigned by Dr. S on October 31, 2014, did not become final under Section 408.123 and Rule 130.12, and we remand the issue of whether the first certification of

MMI and IR assigned by Dr. S on October 31, 2014, became final under Section 408.123 and Rule 130.12 for further action consistent with this decision.

We reverse the hearing officer's determinations that the claimant reached MMI on September 5, 2014, with a 33% IR, and we remand the issues of MMI and IR to the hearing officer for further actions consistent with this decision.

We affirm that portion of the hearing officer's determination that the (date of injury), compensable injury does not extend to C5-6 nerve irritation, C6-7 nerve irritation, brachial neuritis/radiculitis, lumbar spine disc pathology, sacrum, thoracic spine, right shoulder, PTSD, depression, anxiety, short-term memory loss, amnesia, chronic pain syndrome, cervical radiculopathy, cervical discogenic pain syndrome, vision problems, tinnitus, and traumatic brain injury.

We reform Finding of Fact No. 1.D. to include the condition of cervicalgia to reflect the correct stipulation made by the parties at the CCH.

We reverse that portion of the hearing officer's determination that the (date of injury), compensable injury does not extend to cervicalgia, and we render a new decision that the (date of injury), compensable injury does extend to cervicalgia.

REMAND INSTRUCTIONS

On remand the hearing officer shall take official notice of the Division records regarding the date the carrier filed with the Division its DWC-45 disputing Dr. S's October 31, 2014, MMI/IR certification. The hearing officer is to then make findings of fact, conclusions of law, and a decision as to whether the carrier timely disputed Dr. S's October 31, 2014, MMI/IR certification.

If the hearing officer determines that the carrier did not timely dispute Dr. S's October 31, 2014, MMI/IR certification, the hearing officer is to make findings of fact, conclusions of law, and a decision whether there is compelling medical evidence to establish an exception to finality contained in Section 408.123(f)(1).

If the hearing officer determines that none of the finality exceptions in Section 408.123(f)(1) apply, the hearing officer is to make findings of fact, conclusions of law, and a determination to that effect. If the hearing officer determines that there is compelling medical evidence to establish an exception to finality contained in Section 408.123(f)(1), the hearing officer is to make findings of fact, conclusions of law, and a determination to that effect. The hearing officer is then to make findings of fact and conclusions of law on the date of statutory MMI. The hearing officer is then to make

findings of fact, conclusions of law, and a determination of the claimant's date of MMI, which cannot be after the date of statutory MMI, and the claimant's IR.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **AMERICAN ZURICH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3232.

Carisa Space-Beam
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Margaret L. Turner
Appeals Judge